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No. 81-6756

In the Supreme Court of the United States

OCTOBER TERM, 1982

MELVIN E. TUTEN, PETITIONER,

v.

UNITED STATES, RESPONDENT.

ON WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED MAY 20, 1982
CERTIORARI GRANTED OCTOBER 12, 1982

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IN THE SUPERIOR COURT OF THE
DISTRICT OF COLUMBIA

MELVIN E. TUTEN

THE FOLLOWING IS A CHRONOLOGICAL LISTING OF ALL COURT PROCEEDINGS

Docket No. F-6581-79

DATE	ENTRIES
11-24-79	Defendant informed of right to counsel. Defendant informed of complaints. Defendant is not required to make statement as any statement made by defendant may be used against him. Continued to 12-3-79 for preliminary hearing. Personal recognizance, third party custody, Blackman's Development Center.
12-3-79	ISABELLE CORMIER, OFFICIAL COURT REPORTER. Preliminary hearing held. The court finds no probable cause. Defendant discharged. Defendant and attorney present.
7-1-80	CAROLYN G. STILLEY, OFFICIAL COURT REPORTER. Defendant and counsel present. Defendant arraigned Counts E & F. Plea not guilty. Continued to 7-16-80 for status hearing. Personal recognizance.
7-16-80	CAROLYN G. STILLEY, OFFICIAL COURT REPORTER. Defendant and counsel present. Continued to 9-29-80 for status hearing. Bond remains.
9-29-80	TERRY L. HENRY, OFFICIAL COURT REPORTER. Defendant and counsel present. Continued to 10-20-80 for status hearing. Personal recognizance to remain.
10-1-80	CASE REASSIGNED TO Judge Ryan.
10-20-80	ISABELLE M. CORMIER, OFFICIAL COURT REPORTER. Attorney ill and requests a continuance. Case continued to 10-22-80 for status hearing. Bond personal recognizance remains.

DATE	ENTRIES
10-22-80	ISABELLE M. CORMIER, OFFICIAL COURT REPORTER. Status hearing held. Continued to 11-12-80 for trial. Bond personal recognizance remains.
11-12-80	L. PAVLISH, OFFICIAL COURT REPORTER. Case continued to 11-3-80 as back-up. Personal recognizance remains.
11-13-80	L. PAVLISH, OFFICIAL COURT REPORTER. Case continued to 11-14-80 for trial. Personal recognizance.
11-14-80	LINDA CAUSERO, OFFICIAL COURT REPORTER. Court in trial and unable to reach. Case continued 11-17-80 for trial. Personal recognizance. Waiting list for jurors five judges ahead.
11-17-80	JANICE R. HUNT, OFFICIAL COURT REPORTER. Bond (personal recognizance) revoked. Defendant failed to appear for trial. Bond $5,000 surety if defendant is apprehended case continued to 11-25-80 for trial. Bench Warrant ordered and issued forthwith. Case sent to files pending service.
11-19-80	Bench Warrant issued.
11-24-80	JANICE R. HUNT, OFFICIAL COURT REPORTER. Defendant appeared and was taken into custody by U.S.D.M. Case continued to 11-25-80 for trial. Bond $5,000.00 surety.
11-25-80	JANICE R. HUNT, OFFICIAL COURT REPORTER. Court in trial. Case continued to 11-26-80 for trial. Bond $5,000.00 surety remains. PD 163 filed.

DATE	ENTRIES
11-26-80	JANICE R. HUNT, OFFICIAL COURT REPORTER. Jury sworn for trial. Government rests. Defense Order for Motion for Judgment of Acquittal denied. Defense presents case. Trial resumed and stipulations agreed upon as to doctor's report. Defense rest. Arguments and instructions heard. Jury retire to deliberate. Jury reached a verdict Count "E" not guilty. Jury verdict Count "F" guilty (Carrying Pistol without a License). Case continued to 1-5-81 for report and sentence. Bond $5,000 surety remains.
12-01-80	Bench Warrant executed. WALES Cleared. (see entry of November 24, 1980).
1-05-81	KATHLEEN L. PETERSON, OFFICIAL COURT REPORTER. Case continued for sentencing until after pending trial 1-26-81. Continued 1-28-81. Bond remains, $5,000.00 surety.
1-26-81	ROBERT BRADLEY, OFFICIAL COURT REPORTER. Final disposition Count "F" Two (2) years to six (6) years.
1-27-81	NOTICE OF APPEAL FILED THIS DATE.

DISTRICT OF COLUMBIA COURT OF APPEALS

GENERAL DOCKET

DATE	FILINGS—PROCEEDINGS
4/7/81	Record on Appeal (n) ag
4/20/81	Motion of appellant to extend time to file brief 40 days after filing of transcript (m-20) ag GRT/cog (fvf)
4/29/81	Supplemental record (18 pages—Cormier) sl Reporter Peterson 4pd. 5/4 Stilley 4pd. 5/21
4/30/81	Supplemental record #2 (6 pages—Stilley) sl
5/11/81	Supplemental record #3 (4 pages of transcript—Peterson) (n) ag
6/5/81	Supplemental record #4 (7 pages of transcript—Bradley) ag
6/22/81	Appellant's brief (m-22)—pp
7/17/81	Appellee's brief (m-17)—pp
8/3/81	Appellant's reply brief (p-3) mlh
8/26/81	Supplemental record #5 (162 pages of transcript—Hurt) ag
11/25/81	ARGUED before Judges Newman, Kelly and Nebeker.
2/10/82	OPINION per Associate Judge Catherine B. Kelly (p.239) JUDGMENT affirming judgment of conviction.
2/22/82	Appellant's petition for rehearing en banc (m-22) mlh
3/4/82	MANDATE ISSUED kk
3/30/82	ORDER denying appellant's petition for rehearing en banc (NwKyKnNbMkFePyBe) cmj

SUPERIOR COURT OF THE
DISTRICT OF COLUMBIA
CRIMINAL DIVISION—FELONY BRANCH

Criminal No. F6581-79
JUDGE RYAN

UNITED STATES OF AMERICA

v.

MELVIN E. TUTTEN

INFORMATION AS TO PREVIOUS CONVICTION

The United States of America, pursuant to D.C. Code 23-111, hereby informs the Court that the defendant, Melvin E. Tutten is the same person who on February 12, 1971 was previously convicted of Carrying a Pistol without a License in Criminal No. 47324-70 in the Superior Court of the District of Columbia. He is, therefore, subject to the increased punishment provided for by the D.C. Code 22-3204.

CHARLES F.C. RUFF/s/
United States Attorney

/s/ _____
BARRY M. TAPP
Assistant United States Attorney

SUPERIOR COURT OF THE
DISTRICT OF COLUMBIA
CRIMINAL DIVISION

Criminal Action No.
F-6581-79

UNITED STATES OF AMERICA

v.

MELVIN E. TUTEN, DEFENDANT.

Washington, D.C.
Monday, January 5, 1981

The above-entitled action came on for a sentencing before the Honorable JOSEPH M. F. RYAN, JR., Associate Judge, in Courtroom Number 44, commencing at approximately 10:30 a.m.

THIS TRANSCRIPT REPRESENTS THE PRODUCT OF AN OFFICIAL REPORTER, ENGAGED BY THE COURT, WHO HAS PERSONALLY CERTIFIED THAT IT REPRESENTS HER ORIGINAL NOTES AND RECORDS OF TESTIMONY AND PROCEEDINGS OF THE CASE AS RECORDED.

APPEARANCES:

On behalf of the Government:

R. DENNIS OSTERMAN, *Esquire*
Assistant United States Attorney

On behalf of the Defendant:

THOMAS FARQUHAR, *Equire*
Washington, D.C.

KATHLEEN L. PETERSON
Official Court Reporter

TELEPHONE 727-1769

PROCEEDINGS

[2] THE DEPUTY CLERK: United States versus Melvin E. Tuten, for sentencing.

THE COURT: This was a jury trial?

MR. FARQUHAR: That's correct.

THE COURT: He has an arson trial scheduled for the 26th?

MR. FARQUHAR: That's correct, Your Honor.

MR. OSTERMAN: This is Mr. Tapp's case. I don't know whether he wanted to be here for this or not.

THE COURT: I think he probably did.

I tell you, when I read the presentence report today—I think I'd like to know what happens—am I going to try the 26 January case too?

MR. FARQUHAR: Yes, Your Honor.

THE COURT: I think I'd like to set sentencing after that, after the trial on that case.

MR. FARQUHAR: All right.

Your Honor, I might state, if you wish, we could carry it along till that trial. Plus, I have been trying to inquire into the validity of the prior convinction in this particular case. It's a CDW felony, based on a prior CDW conviction. My understanding was the earlier conviction was under the youth act. The presentence report says it was not expunged, but it is my understanding under 55-021(c) [3] it is automatic if you go four years. I ordered the files from the record center on December 4th, but they haven't come in yet. So possibly they could come in in that time.

THE COURT: Let's put this toward the end of the month, after the other trials.

THE DEPUTY CLERK: 28th, 29th?

MR. FARQUHAR: 28th I think would be fine.

[Thereupon, the proceedings in the above-entitled action were concluded at approximately 10:32 a.m.]

[4] **CERTIFICATE OF REPORTER**

(omitted in printing)

SUPERIOR COURT OF THE
DISTRICT OF COLUMBIA
CRIMINAL DIVISION

Criminal Action No.
F-6581-79

UNITED STATES OF AMERICA

v.

MELVIN E. TUTEN, DEFENDANT

Washington, D.C.
Monday, January 26, 1981

The above-entitled action came on for Sentencing before the Honorable JOSEPH M. F. RYAN, JUNIOR, Associate Judge, in Courtroom No. 44, commencing at approximately 9:30 o'clock a.m.

THIS TRANSCRIPT REPRESENTS THE PRODUCT OF AN OFFICIAL REPORTER, ENGAGED BY THE COURT, WHO HAS PERSONALLY CERTIFIED THAT IT REPRESENTS HIS ORIGINAL NOTES AND RECORDS OF TESTIMONY AND PROCEEDINGS OF THE CASE AS RECORDED.

APPEARANCES:

On behalf of the Government:

B. M. TAPP, *Esquire*
Assistant United States Attorney

On behalf of the Defendant:

T. W. FARQUHAR, *Esquire*
Washington, D.C.

ROBERT BRADLEY
Official Court Reporter Telephone 727-1767

PROCEEDINGS

[2] DEPUTY CLERK: Your Honor, number 5 on Your Honor's sentencing calendar, United States versus Mr. Melvin E. Tuten, Case No. F-6581-79.

THE COURT: Mr. Tuten, you are here for sentencing after conviction by a jury on the offense of carrying a dangerous weapon. I will give you a chance to speak, or have your attorney speak on your behalf before I pronounce sentencing.

MR. FARQUHAR: Just briefly, just one point that I want to make, possibly two.

One point the Report recommendation to the Court is favorable, much more than I anticipated.

Although I suppose it's somewhat realistic in his point of view of the event.

One point I did want to raise with the Court in this case, I have looked into the matter in some detail and I think it, as far as conviction is concerned, the only sentence would be a misdemeanor and not as a convicted felon. As you know this case is basically one where he had a prior conviction of carrying a dangerous weapon.

I think the offense took place 1970, and the conviction was in February 1971.

At that time he was Youth Act eligible for sentencing under the Youth Correction Act, and as I see the [3] law frankly, I admit it is not a case one way or the other.

Under the Federal Youth Corrections Act he goes for 4 years without any conviction, and that conviction was espunged, and could not be used for the purpose of recidiviance to enhance the penalty on the second conviction of carrying a dangerous weapon.

I think I mentioned once before and to Mr. Tapp, I had looked into the matter and I did order the records from the Records Center, and I just don't know where the records are.

My original order for the records was dated December 1st, and we are working now almost to February 1st and no records have come in yet.

I would be hopeful I could see the records and see precisely what was done.

Even without the records I would still contend more than likely that I am correct in this matter.

I haven't been able to find a case one way or the other.

There is a case from the United States Court of Appeals called Stevenson, and they say espunged can't be used. It is not one that's thoroughly held, it is kind of a surprise, and if the Court thinks it would affect it along that line, you would have to come up with a particular Youth Act sentence available in this case. If it has come [4] up with one, I can't find one, and I just wanted to point that out to Your Honor. I do think it would make a big difference.

THE COURT: Mr. Tapp.

MR. TAPP: I would like to point out to the contrary. Mr. Tuten is exposed to a 10 year maximum felony for this particular offense. 5010(a) provides that he may be sentenced as a youth offender and unless on a motion of counsel, and if the Court desires if following a motion the recommendation of counsel, it can certainly espunge it.

But no such motion has been made in this case. And the prior docket in this particular case reflects that Mr. Tuten was convicted in 1971, and in that matter has not been espunged since trial.

It is not a question of getting a request or looking at the Court records. And I personally looked at the Court jacket today and got a copy, a certified copy of the conviction which indicates that Mr. Tuten was convicted in 1971 for carrying a pistol without a license. And the matter has not been espunged since that time.

The argument is moot unless old counsel or new counsel, whoever makes a motion to the prior Judge.

Mr. Tuten did that probation, as a matter of fact, and it wasn't even an espungement with respect to the 5010(a) conviction.

[5] I further point out that the facts of this case indicated that Mr. Tuten was carrying a pistol, and was not only carrying it in violation of the law of the District of Columbia, he was carrying it, I dare say, with the intent to use it according to the evidence that we heard from the witnesses. Specifically the mother testified that when Mr. Tuten walked up to the house and asked for her son he was carry-

ing a pistol in his back. Then he was cruising back and forth in front of the house before the Police finally stopped him and apprehended him with the pistol.

Based on the facts of the circumstances in this case a particular period of incarceration is certainly warranted based on the facts of he was carrying a pistol in this particular case. But on other instances with his record certainly reflects a period of lascivious activities with respect to him carrying pistols on other numerous arrests. His present record indicates violent act outs or behavior of Mr. Tuten, and I think a period of incarceration is warranted under the circumstances.

THE COURT: Do you care to reply?

MR. FARQUHAR: Just one remark.

The only difference and the dispute that I would make with Mr. Tapp is, as I understand as far as the espungement is concerned that is automatic under the Statute I believe 5021(d). I am not sure of the provision.

[6] As far as the certificate of rehabilitation is concerned, the statute is somewhat unclear. And I have no idea from what I can tell of any lascivious history. It is not really clear if you go over the certificate of rehabilitation and you have to move the Court as far as espungement is concerned, and I believe that is automatic. I think his argument would be in error on that point. That is the only point I wanted to make.

THE COURT: It just does seem to me that the purpose would be defeated for putting anybody under a Youth Act sentence, no matter how he behaved under a Youth Act sentence, it is just not automatically going to get espunged. I don't think that would be the intent.

Well, I go along with Mr. Tapp's argument. It is probably an interesting point for the Court of Appeals.

But I have looked at my notes and I disagree with the presentence report.

I tried the case. I think I got about 4 or 5 pages of notes.

My sentencing will be 2 to 6 years.

And, Mr. Tuten, you do have a right to appeal.

If you can't afford an appeal you can file in the form of a pauper and the Court Clerk will file an appeal for you if you so desire.

[7] **CERTIFICATE OF REPORTER**

(omitted in printing)

SUPERIOR COURT OF THE
DISTRICT OF COLUMBIA
CRIMINAL DIVISION

Case Number F-6581-79"F"
PDID Number 239-383

UNITED STATES OF AMERICA

v.

MELVIN E. TUTEN

JUDGMENT AND COMMITMENT ORDER

WHEREAS the above-named defendant having entered a plea of

☒Not Guilty ☐ Guilty

to the charge(s) of "F" CPWOL

and having been found guilty by

☒ Jury ☐ the Court

and a pre-sentence investigation and report having been

☒ prepared and considered ☐ not requested

IT IS HEREBY ADJUDGED that the defendant has been convicted of and is guilty of the offense(s) charged.

The defendant having been given an opportunity to make a statement in his own behalf, and the government having had the opportunity to reply thereto, it is hereby

ORDERED that the defendant be committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of

"F" Two (2) years to 8 or (6) years

IT IS FURTHER ORDERED that the Clerk or his Deputy deliver a true copy of this order to the United States Marshal and that the copy shall serve as the commitment of the defendant.

Jan. 26, 1981 — JOSEPH M. RYAN, JR.

Date — *Judge*

A TRUE COPY OF THIS ORDER DELIVERED TO THE U.S. MARSHAL OR HIS DEPUTY:

Jan. 26, 1981 — SOPHIA H. BOYETTE

Date — *Deputy Clerk*

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CRIMINAL DIVISION

Case No. F-6581-79

Jan. 26, 1982

UNITED STATES

v.

MELVIN E. TUTEN

NOTICE OF APPEAL

The appellant hereby appeals to the District of Columbia Court of Appeals for the judgment or order mentioned below.

1. Appellant's Name: Melvin E. Tuten
   Address: 1901 D Street S.W.
   Current Status: ☐ a. Free on: ☐ *Bail*
   ☐ *Personal Recognizance*
   ☐ *Third Party Custody*
   ☒ b. Confined at: D.C. Jail
2. Offense: Carrying a Pistol w/o a License (Felony)
3. Judgment or Order Date: Jan. 26, 1981 Description: Conviction of carrying a dangerous weapon after prior CDW and sentence of not less than two nor more than six years.
4. Issues to be presented by Appellant on appeal: Whether defendant can be convicted of carrying a dangerous weapon (felony) when his prior conviction was under the Federal Youth Correction Act.
5. State the dates and portions of the transcript needed on appeal (*unless specifically requested here, no portion of the transcript will be provided).*

Dates *(If known)*	Portions of Transcript Requested

6. Notice of appeal filed by: ☒ Attorney for Appellant
☐ Defendant *(Pro Se)*

THOMAS W. FARQUHAR
Attorney for Appellant
1320 19th Street N.W.
785-0491
Unified Bar Number: 4077

CD-442/March 76R
Previous editions are obsolete.

DISTRICT OF COLUMBIA COURT OF APPEALS.

No. 81-204

MELVIN E. TUTEN, APPELLANT,

v.

UNITED STATES, APPELLEE.

Argued Nov. 25, 1981.

Decided Feb. 10, 1982.

Defendant was convicted before the Superior Court, District of Columbia, Joseph M. F. Ryan, Jr., Trial Judge, of carrying a pistol without a license, and sentenced to enhanced prison term of two to six years. He appealed. The Court of Appeals, Kelly, Jr., held that: (1) under Federal Youth Corrections Act section governing unconditional discharge from probation prior to expiration of maximum probation, only those youth offenders who are unconditionally discharged by court before completing FYCA probationary sentence are entitled to have their convictions set aside, and a set aside certificate issued to them, and (2) where defendant completed full term of his Federal Youth Corrections Act probationary sentence and was not discharged by court prior to expiration of his sentence, he was not entitled to automatic set aside of his conviction, and conviction was proper basis for recidivist sentence received for carrying pistol without a license.

Affirmed.

Linda S. Gillespie, Washington, D.C., appointed by the court, for appellant.

Lisa J. Stark, Asst. U.S. Atty., with whom Charles F. C. Ruff, U.S. Atty., and John A. Terry and Barry M. Tapp, Asst. U.S. Attys, were on the brief, for appellee.

Before NEWMAN, *Chief Judge*, and KELLY and NEBEKER, *Associate Judges*.

KELLY, *Associate Judge:*

Appellant was convicted by a jury of carrying a pistol without a license in violation of D.C. Code 1981, § 22–3204, and, on January 26, 1981, was sentenced to a prison term of two to six years. The issue on appeal is whether a felony recidivist sentence may be imposed on the basis of a prior Federal Youth Corrections Act (FYCA) conviction. 18 U.S.C. § 5005 *et seq.* (1976).

Appellant, on November 16, 1970, had previously been sentenced under the FYCA to two years probation for carrying a pistol without a license. He was discharged unconditionally at the end of the two years. Appellant did not apply for a certificate setting aside his conviction, and no such certificate was issued by the court. Appellant (in this case) was again found guilty of carrying a pistol without a license on November 26, 1980. Pursuant to D.C. Code 1981, § 23–111, the prosecutor informed the trial court of the earlier confiction which made appellant eligible for an enhanced penalty under D.C. Code 1981, § 22-3204. Based on the earlier conviction, appellant was sentenced as a felon rather than as a misdemeanant.

To determine whether a FYCA conviction may be the basis for a felony recidivist sentence, we look first to the language of the statute itself. *Lewis* v. *United States*, 445 U.S. 55, 60, 100 S.Ct. 915, 918, 63 L.Ed.2d 198 (1980); *Davis* v. *United States*, D.C. App., 397 A.2d 951, 956 (1979). The FYCA provides in 18 U.S.C. § 5021(b) that

> Where a youth offender has been placed on provation by the court, the court may thereafter, in its discretion, unconditionally discharge such youth offender from probation prior to the expiration of the maximum period of probation theretofore fixed by the court, which discharge shall automatically set aside

> the conviction, and the court shall issue to the youth offender a certificate to that effect.

Appellant contends that it was error to base his 1981 sentence on his prior FYCA conviction because that conviction should have been automatically set aside under § 5021(b). He argues that the plain language of the statute, its legislative history, and its purposes mandate an automatic set aside because he successfully completed the probationary sentence imposed upon him under the FYCA. However, the assertion that § 5021(b) mandates automatic set aside ignores the phrase "prior to the expiration of the maximum period of probation heretofore fixed by the court." A statute should not be construed in such a way as to render certain provisions superfluous or insignificant. *United States* v. *Menasche*, 348 U.S. 528, 538-39, 75 S. Ct. 513, 519-520, 99 L.Ed. 615 (1955); *Zeigler Coal Co.* v. *Kleppe*, 175 U.S. App. D.C. 371, 379, 536 F.2d 398, 406 (1976). Following appellant's interpretation of the statute would necessitate violating this fundamental rule of statutory construction.

The language of the statute indicates that convictions are to be set aside only when (1) a youth offender has been given a probationary sentence, (2) a court, in its discretion, decides to discharge him from probation before the term of his probationary sentence has expired, and (3) the discharge is coconditional.

Appellant places primary reliance in his argument on *United States* v. *Arrington*, 618 F.2d 1119 (5th Cir. 1980), *cert. denied*, 449 U.S. 1086, 101 S.Ct. 876, 66 L.Ed.2d 812 (1981). The *Arrington* court decided that a FYCA conviction is automatically set aside when the defendant is sentenced to any term less than the maximum available sentence and the defendant is unconditionally discharged, regardless of whether the discharge occurred before completion of the actual sentence imposed. Not only, in our judgment, does *Arrington* rely on unpersuasive authority, but also the House of Representatives Report makes clear that the time span for unconditional release is measured by the maximum sentence actually imposed, not by the maximum possible sentence for that offense. The report states that the youth offender must be discharged "unconditional-

ly on or before the expiration of the maximum term *fixed by the sentencing judge.*"[1] H.R. Rep. No. 2979, 81st Cong., 2d Sess. 4 (1950) (H.R. Rep.), *reprinted in* [1950] U.S. Code Cong. Serv. 3983, 3986 (UCCS) (emphasis added).

Appellant correctly asserts that the legislative history of the FYCA indicates the intent to use the set aside provision of the FYCA to give ex-offenders the opportunity to clear their records so they will not be hampered in economic and other opportunities later in life. *Doe* v. *Webster*, 196 U.S. App. D.C. 319, 329, 332 n.51, 606 F.2d 1226, 1234-35, 1239 n.51 (D.C. Cir. 1979); *Hearings on S. 1114 and S. 2609 Before A Subcomm. of the Senate Comm. on the Judiciary*, 81st Cong., 1st Sess. 70 (1949) (Hearings) (Testimony of Chief Judge Orie L. Phillips of the United States Court of Appeals for the Tenth Circuit), "This law blots out their sentence and lets them go without any stigma on their life. . . ." *Id.* at 19. When a conviction is set aside, a certificate is issued to the youth offender. A particularly valuable benefit for offenders sentenced under the FYCA is the prospect of earning this certificate. *Durst* v. *United States*, 434 U.S. 542, 548, 98 S.Ct. 849, 852, 55 L. Ed. 2d 14 (1978). When the opportunity for earning a set aside certificate

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[1] *Arrington* cites *United States* v. *Purgason*, 565 F.2d 1279 (4th Cir. 1977), *United States* v. *Fryer*, 545 F.2d 11 (6th Cir. 1976), and *Minshew* v. *United States*, 410 F.2d 396 (5th Cir. 1969). *Purgason* is unpersuasive authority because the defendant's FYCA sentence was set aside prior to the expiration of his actual probationary sentence. *Fryer* merely holds that a FYCA conviction which has been set aside cannot constitute a conviction for purposes of 18 U.S.C. App. § 1202(a) [illegal possession of firearm by a convicted felon] or 18 U.S.C. § 922(a)(6) [making false statement when buying a firearm]. *Minshew* provides, "In the event that he is unconditionally discharged before the expiration of his maximum sentence, the conviction will automatically be set aside. 18 U.S.C. § 5201." *Id.* at 397. None of these cases discuss the maximum available sentence in relation to the actual sentence imposed.

United States v. *Villar*, 416 F.Supp. 887, 889 (S.D.N.Y. 1976), is the only case which supports *Arrington's* interpretation of § 5021. It states in dicta, "If he were to be convicted as a Youth Adult Offender, however, his conviction would be automatically set aside upon his discharge from probation. 18 U.S.C. § 5021." *Villar* does not explain or elaborate on this statement.

was extended to youth offenders placed on probation in 1961, it was noted that this provision "provides an additional incentive for maintaining good behavior by holding out to the youth an opportunity to clear his record." 87 Cong.Rec. 8709 (1961) (Testimony of Mr. Dodd). While a conviction may be officially set aside in the court records, it has no effect on newspapers or other accounts of the conviction. *Doe* v. *Webster*, *supra* at 326, 606 F.2d at 1233. The certificate serves as handy evidence to prove to potential employers and others that the conviction has been eradicated by the good conduct of the offender. However, it is evidence that this opportunity was not intended for all those sentenced under the FYCA. Only those offenders who display exemplary behavior during probation or commitment are entitled to have their convictions set aside. *See Watts* v. *Hadden*, 651 F.2d 1354, 1378 (10th Cir. 1981); *Cox* v. *United States*, 473 F.2d 334, 336 (4th Cir. 1973). A court will discharge a youth offender only when it concludes that rehabilitation is complete. *See* H.R. Rep. at 9, UCCS at 3992; S.Rep. No. 1180, 81st Cong., 1st Sess. 2, 11 (1949) (S. Rep.); Hearings at 45 (Testimony of U.S. Circuit Judge John J. Parker).

In discussing the differences between a criminal conviction and one that can be automatically set aside under the FYCA, the court stated in *Tatum* v. *United States*, 114 U.S. App. D.C. 49, 51, 310 F.2d 854, 856 (1962); "[A] person sentenced under the Youth Corrections Act can, by virtue of his own good conduct, be spared the lifelong burden of a criminal record. . . . [I]t can, by the choice and conduct of the individual, become a noncriminal episode so far as the public records are concerned."

Most importantly, the conviction must actually be set aside before expiration of the probationary sentence imposed upon the youth offender. Chief Judge Bolitha J. Laws of the United States District Court for the District of Columbia stated that "committed youth offenders who earn their final discharge *before* the end of their maximum term have their records cleared and all their civil rights restored." Hearings at 14 (emphasis added). Section 5021(b) is carefully drafted to allow only those youth offenders who

were given probationary sentences and who were unconditionally discharged by a court before the completion of their sentences to reap the benefits of having their convictions set aside.[2] Had Congress intended the convictions of all youth offenders to be set aside upon successful completion of their probationary sentences, it could have stated so clearly.

The principal purpose of the FYCA is to rehabilitate persons who are unusually vulnerable to the danger of recidivism because of their youth. *Dorszynski* v. *United States*, 418 U.S. 424, 433, 94 S.Ct. 3042, 3047, 41 L.Ed.2d 855 (1974); H.R. Rep. at 1, UCCS at 3983; S. Rep. at 1. Thus, rehabilitation is substituted for retribution as a sentencing goal. *Durst* v. *United States*, *supra*, 434 U.S. at 545, 98 S.Ct. at 851; H.R. Rep. at 1, 3, UCCS at 3983, 3985. To effectuate this goal, the FYCA empowers the trial judge with broad discretion to choose among available sentencing options. *Dorszynski* v. *United States*, *supra* at 437, 94 S.Ct. at 3049. It allows the trial judge to obtain an extremely comprehensive presentence report. *See Ralston* v. *Robinson*, ___ U.S. ___, ___, 102 S.Ct. 233, 239, 70 L.Ed.2d 345 (1981); 18 U.S.C. § 5010(e); S.Rep. at 2, 10. In this way, sentences can be determined according to the needs of the particular offender, rather than according to the type of crime committed. *Dorszynski* v. *United States*, *supra* at 434, 94 S.Ct. at 3048. The Act emphasizes flexibility and individual attention. *Durst* v. *United States*, *supra* 434 U.S. at 545, 98 S.Ct at 851. *See* Hearings at 63. For this reason, public policy strongly favors sentencing youths under the FYCA whenever possible. To hold that FYCA

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[2] *Dorszynski* v. *Unites States*, 418 U.S. 424, 435, 94 S.Ct. 3042, 3048, 41 L.Ed.2d 855 (1974); *Watts* v. *Hadden*, *supra*; *United States* v. *Henderson*, 482 F.Supp. 234, 238 (D.N.J.1979); *Cox* v. *United States*, 473 F.2d 334, 336 (4th Cir. 1973); *United States* v. *Bronson*, 449 F.2d 302 (10th Cir.), *cert. denied*, 405 U.S. 994, 92 S.Ct. 1268, 31 L.Ed.2d 463 (1971); *e.g.*, *Doe* v. *Webster*, *supra*; *cf. Tatum* v. *United States*, *supra*; *Cunningham* v. *United States*, 461 F.2d 995, 996 (9th Cir. 1972); *Nast* v. *United States*, 415 F.2d 338, 340 (10th Cir. 1969) (FYCA offenders with non-probationary sentences imposed upon them who are unconditionally discharged before completion of their sentences are entitled to have their convictions set aside).

convictions may not serve as the basis for a recidivist penalty might skew the priorities of a trial court, for when there is a choice between sentencing a defendant as a misdemeanant or under the FYCA, the court may choose the former merely because it could serve as the basis for a later felony conviction, while the FYCA sentence could not. Thus, such a holding could vitiate the policy in favor of sentencing under the FYCA.[3]

Appellant was sentenced under D.C. Code 1981, § 22-3204. It provides for an enhanced penalty when "the violation occurs after he has been convicted in the District of Columbia of a violation of this sentence or of a felony. . . ." Since the enhanced penalty depends on the type of prior conviction, not on the type of sentence received for the prior conviction, it appears obvious that two persons with the same prior convictions would both be subject to enhanced penalties for later convictions even though one was previously sentenced under the FYCA and the other was not. *Cf. United States* v. *Wilson*, 404 F.2d 531 (2d Cir. 1968), *cert. denied*, 394 (U.S. 1003, 89 S.Ct. 1600, 22 L.Ed.2d 781 (1969). (Second offender status is determined by prior conviction under Narcotics Drugs Import and Export Act or other enumerated statute rather than by actual imposition of sentence under one of them.) This provision evidences the congressional belief that no purpose would be served by giving a repeat offender a lenient sentence because he obviously was not rehabilitated by serving the lenient sentence the first time. This applies even more forcefully to the FYCA since persons sentenced under it are

[3] Apart from the testimony of Mr. Dodd, the comments cited herein discuss the 1950 version of the FYCA. Although youths placed on probation were generally charged with lesser offenses, the 1950 version of the Act did not include them. In 1961, § 5021(b) was added. The amendment simply extended the opportunity to have a conviction set aside to youth offenders placed on probation. Because Congress evidenced no intention to alter the basic purpose or functioning of the FYCA in 1961, the comments cited herein are pertinent to § 5021(b). *See* 87 Cong.Rec. 8709 (1961) (Testimony of Mr. Dodd).

For more information on the legislative history of the FYCA, *see Doe* v. *Webster*, *supra*.

given greater opportunities for rehabilitation than are other offenders.

Unless there are persuasive reasons to the contrary, we must construe a statute according to the ordinary meaning of the words. *See Temporaries Inc.* v. *District Unemployment Compensation Board*, D.C. App., 304 A.2d 14, 17 (1973). In the instant case, the legislative history contains no persuasive reasons to the contrary, while the case law and public policy support the plain meaning of the statute. Accordingly, we hold that under the FYCA § 5021(b) only those youth offenders who are unconditionally discharged by a court before completing a FYCA probationary sentence are entitled to have their convictions set aside, and have a set aside certificate issued to them.

When a conviction has not been set aside, it may be the basis of a recidivist penalty. *Barker* v. *United States*, 579 F.2d 1219, 1226 (10th Cir. 1978); *See United States* v. *Brzoticky*, 588 F.2d 773 (10th Cir. 1978); *cf. Lewis* v. *United States*, *supra* 445 U.S. at 61 n.5, 100 S.Ct. at 918 ("... a disability based upon one's status as a convicted felon should cease only when the conviction upon which that status depends has been vacated."); *New Banner Institute, Inc.* v. *Dickerson*, 649 F.2d 216, 219 (4th Cir. 1981) (a federal firearm disability imposed because of a prior felony conviction is removable by vacation of the prior conviction). In the instant case, appellant completed the full term of his probationary sentence; he was not discharged by a court prior to the expiration of his sentence. Thus, he was not entitled to an automatic set aside of his conviction, and the conviction was a proper basis for the recidivist sentence he received in 1980 for carrying a pistol without a license.

If sentencing a defendant as a felon based on a FYCA conviction is unjust, the remedy must be afforded by Congress, not this court in the guise of statutory construction, because questions of severity of punishment are peculiarly for the legislature. *Dorszynski* v. *United States*, *supra* 418 U.S. at 442, 94 S.Ct. at 3052.

Affirmed.

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 81-204

F 6581-79

MELVIN E. TUTEN, APPELLANT,

v.

UNITED STATES, APPELLEE.

BEFORE: NEWMAN, *Chief Judge*; KELLY, KERN, NEBEKER, MACK, FERREN, PRYOR, and BELSON, *Associate Judges*.

ORDER—March 30, 1982

On consideration of appellant's petition for rehearing en banc, and it appearing that no judge of this Court has called for a vote thereon, it is

ORDERED that appellant's petition is denied.

PER CURIAM

Copies to:
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2nd and D Streets, SW, 20515
John A. Terry, Esquire
Assistant U.S. Attorney

Supreme Court of the United States

No. 81-6756

MELVIN E. TUTEN, PETITIONER,

v.

UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI TO the District of Columbia Court of Appeals.

ON CONSIDERATION of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and the petition for writ of certiorari be, and the same is hereby, granted.

OCTOBER 12, 1982